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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 309

G. R. ABERNATHY, ET AL.,
Petitioners

VERSUS

CITY OF IRVINE, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue from this Court to review judgments of the Court of Appeals of Kentucky in the above-entitled cause.

Citation to Opinion Below

The opinion of the Court of Appeals of Kentucky, printed in Appendix A hereto, is reported in 355 S.W. 2d 159.

Jurisdiction

This Petition for a Writ of Certiorari seeks review by this Court of judgments of the Court of Appeals of Kentucky dated May 5, 1961, affirming in part the judgment of the Estill Circuit Court on an appeal therefrom and reversing in part said judgment on a cross-appeal therefrom; which judgments of the Court of Appeals of Kentucky were entered on March 16, 1962, after denial of a Petition for Rehearing by Order entered March 16, 1962.

By Order of Mr. Justice Potter Stewart, entered herein on May 23, 1962, the time for filing this Petition for a Writ of Certiorari was extended to and including August 13, 1962.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A. § 1257 (3).

Question Presented for Review

The question presented for review is whether the City of Irvine and Estill County may, on the pretense of making a 99-year lease renewable in perpetuity and at a rental of $1 per year, give a $400,000 hospital constructed with public funds to a religious organization known as the St. Walburg Monastery of Benedictine Sisters of Covington, Kentucky.

The Constitutional Provisions, Statutes, and Regulations Involved

The Constitutional provisions involved in this case are:

United States Constitution — First Amendment
United States Constitution—Fourteenth Amendment
Kentucky Constitution—Section 3
Kentucky Constitution—Section 5

Kentucky Constitution—Section 14
Kentucky Constitution—Section 171
Kentucky Constitution—Section 177
Kentucky Constitution—Section 178
Kentucky Constitution—Section 179, and the pertinent text of each is set out in Appendix B.

The Statutes involved in this case are:
Title 42, U.S.C., Section 291h(a) (4)
Title 42, U.S.C., Section 291m
Kentucky Revised Statutes—Section 216.040,
Kentucky Revised Statutes—Section 216.240, and the pertinent text of each is set out in Appendix C.

The Regulations involved in this case are:
PHS Regulation 53.127 (d) (1) (ii)
PHS Regulation 53.128, and the pertinent text of each is set out in Appendix D.

Statement of the Case

Pursuant to statutory authority [1] and with electorate endorsement by affirmative answer of the following question:

> "Shall Estill County, Kentucky, issue bonds to the amount of $90,000.00 for the purpose of constructing and furnishing a public hospital in and for said County?" [2]

the Fiscal Court of Estill County issued general obligation bonds [3] in the face amount of $90,000.00 to be retired from the proceeds of a special tax levy [4]. The City of

(1) Chapter 216, Kentucky Revised Statutes; as shown by Exhibit C, paragraph III, Record p. 24; admitted by Answer, paragraph I, Record p. 41.
(2) See Complaint, paragraph 8, Record p. 8; admitted by Answer, paragraph I, Record p. 40.
(3) Exhibit C, paragraph III, Record p. 24.
(4) Stipulations, paragraph 2, Record p. 52.

Irvine, with like approval, issued its general obligation bonds in the amount of $95,000.00 [5]. The City and County then made a joint application [6] for $200,000.00 of Hill-Burton funds [7] which was subsequently approved. With these public funds, and on a site purchased with contributions from citizens of the City and County [8] they built a public city-county hospital.

In making application for Hill-Burton funds, the City and County represented to the State and Federal Governments that they could jointly finance the operation of the hospital when completed [9]. Mr. Paul Hackney, the state official charged with the responsibility of administering Hill-Burton funds in Kentucky, so found [10]. However, after the public funds had been committed and partially spent and although a group of citizens proposed a plan [11] by which the City and County could operate the hospital, the City Council and the Fiscal Court reversed their positions and announced that the City and County could not afford to operate the hospital.

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[5] Complaint, paragraph 4, Record p. 9; admitted by Answer, paragraph 1, Record p. 41.

[6] Exhibit C, paragraph II, Record p. 23; Answer, paragraph 1, Record p. 41.

[7] Complaint, paragraph 4, Record p. 9; Answer, paragraph 1, Record p. 41.

[8] Exhibit C, paragraph II, Record p. 23; Answer, paragraph 1, Record p. 41; and Order, Record p. 32.

[9] Title 42, U.S.C., Section 291h(a) (4), see Appendix C; PHS Regulation 53.127 (d) (1) (ii), see Appendix D; Memorandum of Agreement, paragraphs 1 and 2, page 4, Defendants' Exhibit No. B, Record p. 199.

[10] Question 9, Record pp. 154 et seq.; Question 11, Record pp. 156-157.

[11] Abernathy Exhibit 1, Record p. 145; Abernathy Exhibit 2 (3 page Report), Record p. 149.

Over the protests of interested citizens and taxpayers [12] the City Council and the Fiscal Court then entered into an "Agreement of Lease" [13] which, in short and with emphasis added, provides as follows:

"AGREEMENT OF LEASE

". . . the City of Irvine . . . and the Fiscal Court of Estill County . . . Lessors, in consideration of the rents and covenants hereinafter stipulated to be paid and performed by the St. Walburg Monastery of Benedictine Sisters of Covington, Kentucky, **a religious organization** incorporated under the laws of . . . Kentucky, the Lessee, . . . hereby . . . lease unto the said Lessee . . .

". . . Estill County Hospital and site . . .

". . . **for . . . 99 years . . . with the privilege of renewing said lease for like terms, forever.**

". . . as a consideration thereof, . . . in the event the Lessee at any time fails or ceases to use said property for charitable hospital and or charitable nursing home purposes . . . then . . . this Lease shall be null and void, and the Lessors shall re-enter . . .

". . . in consideration thereof, . . . the Lessee will not begin the operations of said hospital until final approval and acceptance of the hospital by the . . . State . . . and . . . the United States Government.

". . . Lessee shall maintain said hospital and the equipment . . . and shall . . . maintain insurance . . . but in event of a loss . . . the proceeds of such insurance shall be used to restore same . . .

(12) Abernathy Exhibit 1, Record p. 145; Abernathy Exhibit 3, Record p. 146; Question 14, Record p. 131.

(13) Exhibit A, Record pp. 14 et seq.; Stipulations, paragraph 3, Record p. 53.

". . . Lessee shall have the privilege of adding to the present hospital building . . .

". . . **Lessee shall have the right to make reasonable charges to all patients** for care and nursing.

". . . paying therefor . . . **$1.00** . . . **per annum.**

. . .

". . . **nothing . . . shall prevent Lessee . . . from the erection of buildings and other installations on said described premises** and incident to such usage as is herein permitted.

". . . . **Lessee . . . shall . . . peaceably and quietly hold,** occupy and enjoy said premises . . . **without any let, hindrance, ejection or molestation** by said Lessors . . . "

Even though it is incorporated, the Lessee is a religious organization [14]; the organization itself (not just its individual members) being Roman Catholic [15]. The Lessee is subject to ecclesiastical authority in the person of the Pope [16], the Congregation of the Holy Office [17], and the Congregation of the Religious [18].

The evidence leaves no doubt that the hospital would be operated by the religious organization for religious purposes and not simply as a public charity. The Sisters would operate the hospital in accordance with the Code of Medical Ethics for Catholic Hospitals [19] which, with Ethical and Religious Directives for Catholic Hospitals, enjoins an

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(14) Exhibit A, Record p. 14.
(15) Question 4, Record p. 112.
(16) Questions 21 and 22, Record p. 114; Question 25, Record p. 115.
(17) Questions 32-35, Record p. 116.
(18) Questions 36-38, Record p. 116.
(19) Stipulations, paragtaph 4, Record p. 53; Question 32, Record p. 116; Plaintiffs' Exhibit 1.

obligation of "spiritual" as well as medical care of patients [20]. This obligation is recognized by the Sisters [21]. In addition to the direct religious influence brought to bear on patients for their "spiritual" care by the Sisters, which must be inferred from that obligation and from the Sisters' vow of obedience [22]; an indirect religious influence would be had on patients by the Sisters' apparel [23] and the distribution of religious literature [24].

Furthermore, that the property will be put to religious use is confirmed by the fact that the Sisters have already built a chapel [25] and a Nunnery [26] on the property; which facilities are incidental to religious use and not to charitable use.

Quite obviously, the operation of a nominally public hospital by a religious organization would have a religious influence in the community, and a public facility would become a mission of the church [27].

According to their agreement, the City and County relinquished complete control of the hospital to the religious organization [28] and the religious organization proposes to exercise complete control of the operation of the hospital [29]. Neither the State nor the Federal Government is permitted by law to exercise control over the operation of the hospital [30]. Although both the opinion of the trial

(20) Plaintiffs' Exhibit 1, p. 1; Plaintiffs' Exhibit 4, p. 1, paragraph 1; and see Stipulations, paragraph 4, Record p. 53.

(21) Question 39, Record p. 117.

(22) Question 25, Record p. 115.

(23) Questions 15-18, Record p. 114.

(24) Questions 1 and 2, Record pp. 127-128.

(25) Questions 12 and 13, Record p. 113.

(26) Question 25, Record p. 185.

(27) Question 7, Record p. 140.

(28) Exhibit A, Record p. 19.

(29) Question 19, Record p. 114.

(30) Title 42, U.S.C., Section 291m, see Appendix C; Questions 12-14, Record pp. 157-158; Question 37, Record p. 165; Questions 44-45, Record pp. 168-169.

judge [31] and the opinion of the Kentucky Court of Appeals [32] make mention of a "side agreement" between the religious organization on the one hand and the State and Federal officials on the other hand; there is no evidence in the record to support such statement. The record shows that the only agreement is the lease [33] itself [34]. The lease itself simply requires delay in commencement of operations of the hospital until construction is completed and the plant accepted by State and Federal authorities [35]. The only agreement requiring compliance with the Hill-Burton Act [36] is one to which the religious organization is not a party.

Their protests having been to no avail, and upon refusal of the City Council and Fiscal Court to operate the hospital [37] pursuant to the requirements of Chapter 216 of the Kentucky Revised Statutes [38], the plaintiff citizens and taxpayers [39] brought this action against the City, the the City Council, and the Fiscal Court [40] demanding that the lease be cancelled and that the City and County be directed to operate the hospital as provided by statute [41].

Plaintiffs first raised federal questions in paragraph 6 of their Complaint [42] where they charged that the lease was "an effort and purpose" on the part of City and County of-

(31) Record p. 57; see Appendix A.
(32) Record pp. 79, 94; see Appendix A.
(33) Exhibit A, Record pp. 44 et seq.
(34) Question 39, Record pp. 166-167.
(35) Exhibit A, Record p. 16; See PHS Regulation 53.128, Appendix D.
(36) Defendant's Exhibit B, Record p. 199.
(37) Abernathy Exhibit 1, Record p. 145; Abernathy Exhibit 3, Record p. 146; Question 14, Record p. 131.
(38) KRS 216.040, 216.210, see Appendix C.
(39) Stipulations, paragraph 1, Record p. 52.
(40) Complaint, paragraph 2, Record p. 8; Answer, paragraph 1, Record p. 40.
(41) Complaint, Record p. 13.
(42) Complaint, Record p. 10; Complaint, Appendix E.

ficials "to make a gift of . . . public property . . . to . . . the Catholic Church, . . . in violation of . . . the First and Fourteenth Amendments to the Constitution of the United States . . ." In the same paragraph plaintiffs also alleged that "(t)he giving of said property to said Catholic Church and its agency in perpetuity constitutes a granting of exclusive separate public emoluments and privileges to said Catholic agency without consideration of public service and constitutes giving preference to a religious sect in violation of the basic and fundamental constitutional provisions, state and federal, for the separation of church and state." Again in paragraph 9 of the Complaint [43] federal questions were raised by allegations that ". . . public property is in legal effect donated and given to the said Catholic Order, an integral part and agency of the Catholic Church, . . . (which) constitutes the donation of state taxes and federal taxes (under the Hill-Burton Law) to support the religious activities of the Catholic Church and one of its institutions and the teaching and practicing of the Catholic religion, and . . . (which) constitutes a violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States . . ."

The trial judge decided [44] that the lease was invalid insofar as it divested the public officials of control of the management of the hospital, but he did not reach and decide the federal question [45].

The judgment of the trial court was paradoxical in that, although it condemned the divestment of control of the hospital by the public officials, it did not require them to assume control of the hospital. That judgment having not

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(43) Complaint, Record p. 12; Complaint, Appendix E.

(44) Memorandum Opinion, Record pp. 56-63; Trial Court Opinion, Appendix A.

(45) Judgment, Record pp. 64-65; Judgment, Appendix E.

disposed of the whole controversy, plaintiffs filed a Motion and Grounds for a New Trial [46] by which they raised another federal question [47] as follows:

> "Plaintiffs further move that said judgment be set aside and a new trial be granted herein for reason that the judgment is violative of the Fourteenth Amendment to the Constitution of the United States, in that the court as an officer and agent of the State of Kentucky and the State of Kentucky by and through said court has deprived the plaintiffs, citizens and taxpayers of Estill County and the City of Irvine, of said public hospital without due process of law and has denied to plaintiffs, the citizens and taxpayers of said city and county, of the equal protection of the laws. . . ."

The trial judge overruled the Motion and Grounds for New Trial. [48]

On appeal, the federal questions were argued by Briefs, as appears from the next to last paragraph of the opinion of the Court of Appeals of Kentucky [49] where the court says:

> "The final contention of the appellants is that the lease gives public property to a religious organization in violation of Sections 1, 3 and 5 of the Kentucky Constitution and the First and Fourteenth Amendments to the Constitution of the United States. This contention is fully answered and refuted by the opin-

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(46) Motion and Grounds for New Trial, Record, pp. 65-68. Motion and Grounds for New Trial, Appendix E.

(47) Motion and Grounds for New Trial, paragraph II, Record p. 67; see Appendix E.

(48) Order, Record pp. 68-69; Order, Appendix E.

(49) Record, pp. 81-82, Record p. 96; see Appendix A; see Appendix E.

ion in Kentucky Building Commission v. Effron, 310 Ky. 455, 220 SW 2d 836."

On Petition for Rehearing [50] in the Court of Appeals of Kentucky, the Plaintiff-appellants again pointed out to the court that its decision was in conflict with the Constitution of the United States [51]; but the Petition for Rehearing was overruled [52].

Reasons for Granting the Writ

1. The Kentucky Court of Appeals has decided federal questions of substance not heretofore determined by this Court and in a way not in accord with the principles enunciated by this Court in applicable decisions.

This court has consistently held that under the First and Fourteenth Amendments to the Constitution of the United States, there is a wall of separation erected between church and state, which cannot be breached by either. The principle is stated in the Everson case [53] and in the McCollum case [54] as follows:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or for professing religious beliefs or disbeliefs, for church atten-

(50) Petition for Rehearing, Record pp. 87-107.
(51) Petition for Rehearing, Record pp. 88, 91; see Appendix E.
(52) Order, Record p. 108; see Appendix E.
(53) Everson vs. Board of Education, 330 US 1, 91 L ed 711, 67 S Ct 504, 168 ALR 1392, 1404.
(54) Illinois ex rel. McCollum vs. Board of Education, 333 US 203, 92 L ed (Adv 451), 68 S Ct 461, 2 ALR 2d 1338, 1347.

dance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'." (Emphasis added)

In his concurring opinion in the McCollum case [55], Mr. Justice Jackson said:

"A Federal Court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the Federal Constitution. Ordinarily this will come about in either of two ways:

"First. When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement . . .

"Second. Where a complainant is deprived of property by being taxed for unconstitutional purposes, such as directly or indirectly to support a religious establishment. We can protect a taxpayer against such a levy . . ."

In the recently decided Engel case [56], this Court said [57]:

[55] Illinois ex rel. McCollum vs. Board of Education, 333 U.S. 203, 92 L ed (Adv 451), 68 S Ct 461, 2 ALR 2d 1338, 1358-1359.

[56] Engel, et al., vs. Vitale, et al., decided June 25, 1962, 30 LW 4550.

[57] Engel, et al., vs. Vitale, et al., decided June 25, 1962, 30 LW 4550, 4554.

". . . To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

'(I)t is proper to take alarm at the first experiment on our liberties . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' "

A. The Kentucky Court of Appeals has here decided that local governments may lawfully turn over to a religious organization a $400,000 public hospital for use, at least in part, for religious purposes — applicable provisions of the First and Fourteenth Amendments of the United States Constitution and the principles hereinabove mentioned to the contrary notwithstanding. Although in Bradfield vs. Roberts [58] the Supreme Court held that public money could lawfully be given to a private hospital corporation, the members of which were all of one faith, the opinion carefully pointed out that the corporation was a secular legal entity. This Court has never determined whether the First and Fourteenth Amendments are violated by the use of publicly owned hospital facilities by a religious organization which, though incorporated, is subject to ecclesiastical control.

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[58] Bradfield vs. Roberts, 175 US 291, 44 L. ed 168, 20 S Ct 121.

B. The Kentucky Court of Appeals has here decided that local governments may divert federal tax moneys which were the subject of a grant under the Hill-Burton Act [59] to use by a religious organization — applicable provisions of the First and Fourteenth Amendments and the principle of church-state separation to the contrary notwithstanding. As pointed out above, the Bradfield case does not reach this question; and in no other case has this Court considered the constitutionality of the use of Hill-Burton funds for sectarian hospitals.

C. The Kentucky Court of Appeals has here approved the use of both federal and state taxes for the support of a religious organization. This holding is not in accord with the applicable decisions of this Court — particularly the Everson [60], McCollum [61], and Engel [62] cases which, though arising from different factual situations, proclaim the "durable First Amendment philosophy" that public money cannot be used for either direct or indirect support of religious institutions.

2. The Kentucky Court of Appeals has here deprived the petitioners of their property without due process of law and has refused them the equal protection of the law, all contrary to the Fourteenth Amendment of the Constitution of the United States.

A. The Kentucky Court of Appeals apparently decided this case on the basis of expediency, rather than on the basis of law. It has refused to accept and follow the man-

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(59) Title 42, U.S.C., Sections 291 et seq.

(60) Everson vs. Board of Education, 330 US 1, 91 L ed 711, 67 S Ct 504, 168 ALR 1392.

(61) Illinois ex rel. McCollum vs. Board of Education, 333 US 203, 92 L ed (Adv 451), 68 S Ct 461, 2 ALR 2d 1338.

(62) Engel, et al., vs. Vitale, et al., decided June 25, 1962, 30 LW 4550.

dates of the Kentucky Constitution [63] that public funds of the Commonwealth and its political subdivisions be not used for the aid of any sectarian institutions. This constitutes a violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution as well as the "equal protection" clause of the same Amendment. Unless this Court intercedes, the petitioners will have no remedy for the deprivation of their constitutional rights.

B. So also has the Kentucky court refused to apply the mandatory provisions of the statute [64] under the authority of which the bonds were issued and the hospital built. For the same reasons as those expressed in the preceding paragraph, this Court should intercede to protect petitioners' constitutional rights.

Argument

This is not anti-Catholic litigation. It could just as well involve a religious organization of any other faith, sect, or denomination. Neither is this anti-religious litigation. As has been often pointed out by this Court and by many writers on constitutional law, religion suffers when it is not wholly separated from the state.

Emotional outbursts concerned with the healing of the sick do not offer a solution to the problem. There is no question but that sectarian hospitals render a high and noble service to their communities. But sectarian hospitals need not be financed by tax money to render such service. And, indeed they should not be so financed.

The Irvine-Estill County Hospital has been built with tax money. It belongs to all of the people of Irvine and Estill County. They have "mortgaged their future" to pay

(63) Kentucky Constitution, Sections 3, 5, 14, 171, 177, 178, 179; See Appendix B.

(64) KRS 216.040, 216.240; See Appendix C.

the special tax levy necessary to retire the bonds issued to finance its construction. Their hospital must not be given away by their elected officials, even to an organization with the high and noble purpose of healing the sick.

Now, had the lease been not in perpetuity and had it been for a consideration sufficient to retire the bonds and to repay the tax-money spent to erect and equip the hospital, we might have a different situation. But such is not this case.

Had there been no public need for the hospital property, there might exist some justification for its sale or lease. But it was built because of the public need.

Were the Sisters a secular corporation with the sole purpose of operating a non-sectarian charitable hospital, Bradfield vs. Roberts might shed light on the present problem. But St. Walburg Monastery of Benedictine Sisters is a religious organization, sworn to pursue a religious purpose, and subject to religious authority. The property has already been put to a religious use by the addition of a chapel and a nunnery; and furthermore, the evidence is clear that the operation of a Catholic hospital has definite religious overtones and exerts a religious influence both on patients and the public. This case cannot be lightly dismissed as another "Bradfield case".

The issue is really a simple one: — May government lawfully expend public funds to construct a hospital and then lease the hospital in perpetuity for less than an adequate consideration to a religious organization which, although in corporate form, is subject to ecclesiastical control and which will use the hospital, at least in part, for religious purposes?

If a writ of certiorari is granted, this Court will have the opportunity to mend this unwarranted and unconstitutional

breach of the wall of separation between church and state and the opportunity to set aright the mistaken opinion that government may finance religious organizations where the courts believe it to be expedient.

If the writ be not allowed, other courts may in error rely on the decision of the Court of Appeals of Kentucky and widen the breach in the wall of separation between church and state — to the everlasting discredit of a great and fundamental principle of American Constitutional Law.

If the Kentucky decision be permitted to stand, there appears to be no reason why religious organizations and friendly governmental authorities could not make concerted raids on public treasuries for the collateral needs of the religious organizations.

No matter how good and worthwhile are the services rendered to the public by religious organizations, the public must never be required to support them with tax money.

Conclusion

For the reasons set out above, the petitioners respectfully submit that a writ of certiorari should issue to the Court of Appeals of Kentucky and that this case should be heard and decided by the Supreme Court of the United States.

Respectfully submitted

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APPENDIX A

OPINIONS OF THE LOWER COURTS

The Kentucky Court of Appeals

After completion by the City of Irvine and the County of Estill of the construction of a joint city-county hospital building, financed by voted bond issues of the city and county and by a grant of federal funds under the Hill-Burton Act, 42 U.S.C.A. § 291 et seq., the governing authorities of the city and county found that they did not have adequate financial resources to operate the hospital. They sought in vain for some time to find a private organization willing to undertake the operation and finally obtained an agreement to do so from the St. Walburg Monastery of Benedictine Sisters of Covington, Kentucky. The legislative bodies of the city and county authorized the execution of a long-term lease of the building to the Sisters, at a rental of one dollar per year, and such a lease was executed. The lease requires that the Sisters use the property for 'charitable hospital and or charitable nursing home purposes;' that they not commence operation of the hospital until receiving approval and acceptance by the Division of Hospital Facilities of the State of Kentucky and the Health Facilities Section of the United States Government; that they maintain the property in reasonably good condition at their expense, and keep the property insured against loss by fire or storm. In order to comply with regulations under the Hill-Burton Act the Sisters further were required to agree that they would operate the facility as a public non-profit hospital for a period of 20 years, they would accept a reasonable number of indigent or charity cases, and would not deny admission to any patient solely because of race, creed or color.

A group of citizens and taxpayers of the city and county brought this action asking that the lease be declared invalid and that the city and county officials be ordered to take over the control, management and operation of the hospital. The judgment of the circuit court declared that so much of the lease agreement as divested the public officials of the city and county of control of the management of the property and of the hospital operation was void, but the judgment dismissed that part of the complaint asking that the city and county officials be ordered to take over the operation of the hospital. The plaintiffs have appealed and the defendants have cross-appealed.

The first contention of the appellants is that the city and county had no power or authority to enter into any lease of the hospital property. We find no merit in this contention. In Perkins v. City of Frankfort, Ky., 276 S.W.2d 449, a similar lease of the city hospital of Frankfort, to the King's Daughters, was upheld. A lease of a county hospital to a private organization was upheld in State Bank & Trust Company of Richmond v. Madison County, 275 Ky. 501, 122 S.W.2d 99. A lease of part of the courthouse yard by a county to a blind person, for operation of a refreshment stand, was held valid in Burns v. Moore, 307 Ky. 167, 209 S.W.2d 735. A lease of part of the State Fairgrounds to a private organization was held valid in Lehman v. Matthews, Ky., 343 S.W.2d 133. In Southeastern Greyhound Lines v. City of Lexington, 299 Ky. 510, 186 S.W.2d 201, 202, it was held that the city could sell land acquired for a municipal auditorium where the city had been required to abandon its original purpose because of a lack of funds to carry out the purpose. Broad powers to sell real estate are granted to counties and cities under KRS 65.010, 67.080, and 82.060, and it is an established principle that the power to sell includes the power to lease. Burns v.

Moore, 307 Ky. 167, 209 S.W.2d 735. The city and county being financially unable to carry out their original purpose of operating the hospital as a governmental institution, we think they had the power to lease the hospital property.

The second contention of the appellants is that under KRS 216.040, relating to county hospitals, and KRS 216.240, relating to city hospitals, the city and county were required to control and operate the hospital and could not surrender this duty to others. In substance, the argument is that if a city or county, or both jointly, once undertake a hospital project they must continue to maintain it as a governmental institution. We think, however, that the statutes relied upon mean only that so long as a hospital is operated as a governmental institution the appropriate public officials must manage and control it. Here the county and city found themselves unable to operate the hospital as a governmental institution, and they chose to accomplish the purpose of making hospital facilities available for the community by leasing the hospital building to the Sisters, for operation by them of a private hospital serving the public. The statutes do not demand that a county or city maintain a hospital as a function of government; they merely require that if a hospital is maintained as a governmental institution it be controlled and managed by public officials. Under the lease here involved the city and county have no financial obligation in the hospital operation, so there is no need for operational control by them.

A related contention of appellants is that the city and county could not delegate part of their functions and responsibilities to a private organization. The circuit court, in upholding this contention, relied on Booth v. City of Owensboro, 274 Ky. 325, 118 S.W.2d 684, 686. The appellees, on their cross-appeal, maintain that the Booth case is not applicable and that the lease here in question does not

make an invalid delegation. In the Booth case the governing board set up to operate a city-county hospital included representatives of a private organization, with the result that private persons shared in management decisions. The court held that the city and county had no authority to 'take a private corporation or individuals into partnership in conducting such public enterprise.' In the instant case the hospital is not being operated as a governmental institution — the city and county simply have placed the building in the hands of a private organization for the purpose of the operation of a hospital by that organization. There is no delegation of responsibility for the operation of a governmental institution because no governmental institution has been established. A similar lease of hospital property by the City of Frankfort was held valid in Perkins v. City of Frankfort, Ky., 276 S.W.2d 449, as against the contention that the lease constituted an unlawful delegation of power. It is our opinion that the lease here in question is not invalid as unlawfully divesting the public officials of control and management of the hospital operation and that the circuit court erred in holding it invalid.

The final contention of the appellants is that the lease gives public property to a religious organization in violation of Sections 1, 3 and 5 of the Kentucky Constitution and the First and Fourteenth Amendments to the Constitution of the United States. This contention is fully answered and refuted by the opinion in Kentucky Building Commission v. Effron, 310 Ky. 355, 220 S.W.2d 836.

On the direct appeal the judgment is affirmed; on the cross-appeal the judgment is reversed to the extent that it declares the lease invalid on the ground of divestiture of public control, with directions to enter judgment declaring the lease to be valid.

The Estill Circuit Court

This is an action in which a group of taxpayers seek to prevent the operation of a public hospital in Estill County by the Benedictine Sisters under the terms of a lease agreement and further seek to compel the county and city to take over the control and operation of the hospital.

The City of Irvine has issued $95,000.00 and Estill County has issued $90,000.00 of general obligation bonds, the proceeds of which were used to purchase the grounds and erect and partially equip a hospital building. Some $20-000.00 (sic) was contributed to the project under the Hill-Burton Act of Congress, and an amount uncertain was raised by private solicitation for the hospital project. The bonds were voted upon the question: 'Shall * * (the city, county) issue bonds * * for the purpose of constructing and furnishing a public hospital * *'

The hospital building had been virtually completed and partially equipped at the time of the commencement of this action. I understand from sources outside the record that the hospital is presently in operation. The city council and the fiscal court in good faith entered into an agreement with the Benedictine Sisters to operate the hospital. The agreement is in the form of a lease providing for a term of 99 years from May, 1959, at a rent of $1.00 per year for the purpose of operating a charitable hospital and/or nursing home, with power in the Sisters to make reasonable charges for the services and to enjoy the premises during the term free from hindrance of the fiscal court or the city council or persons claiming through them. No commitment for any further expenditures of money by the fiscal court or city council on the project has been made. There is an agreement by the Sisters, outside of the document referred to, to administer the installation as a public non-profit

hospital for at least 20 years, not to discriminate among patients seeking admission and treatment, and to admit a reasonable number of charity cases, in accord with the conditions of the grant under the Hill-Burton Act.

The proposed administration of the hospital by the Sisters will be in conformity with the Code of Medical Ethics for Catholic Hospitals, the standard guide for hospitals run by Catholic Orders. There is no proof to support the allegation of the Complaint that the Sisters or the Catholic Church will use the proprietary position for gratuitous proselytization or profit to the Catholic Church.

A tax has been levied by both the fiscal court and the city council to provide an interest and sinking fund for the servicing of the general obligation bonds.

In arguing against the lease plaintiffs contend that the long tenure of the Sisters free from hindrance by the city or fiscal court is a delegation of a public function to a charitable organization contrary to the legal requirement that the administration of a publicly owned hospital must be wholly within the control of the public officials. K.R.S. 216.040, Booth vs. City of Owensboro, 274 Ky. 325, 118 S.W. (2d) 684; 275 Ky. 482, 122 S.W. (2d) 111. See also State Bank, etc. vs. Madison County, 275 Ky. 501, 122 S.W. (2d) 99. Plaintiffs also argue that this operating agreement amounts to a preference for a particular religious sect, and is public support of a religious institution contrary to sections 5 and 179 of the Kentucky Constitution. They finally contend that under K.R.S. Chapter 216 the city and county are required to directly operate this institution.

In support of the arrangement defendants argue that public authorities can legally channel public funds for hospital purposes through the conduit of a private charity,

and even though the charity is of a particular faith, such expenditure is not a violation of Section 5 and Section 179 of the constitution. Kentucky Building Commission vs. Effron, 310 Ky. 355, 220 S.W. (2d) 836. They contend that the Booth cases do not apply to this situation because there is no pledge of future revenues, and further, that the Booth cases have been impliedly repealed by the Effron case.

In terms of practicalities defendants point out that there are four other publicly owned hospital facilities in other Kentucky Counties being operated exactly as is proposed in this instance and that the Estill County Municipal Governments will be hard put, if not unable to otherwise furnish the much needed hospital service. Though this argument should make no difference on this submission, it of course becomes a consideration.

The Effron case in holding that the construction of all non-profit hospital facilities is a public purpose, states:

> 'It is well settled that a private agency may be utilized as the pipeline through which a public expenditure is made, the test being not who receives the money, but the character of use for which it is expended.' (220 S.W. (2d) 837)

Even though the long term of uninterrupted operation by the Benedictine Sisters makes the instant institution a privately administered hospital, the above language would seem to justify the present operating plan. Directly in opposition, however, are the somewhat earlier Booth cases which categorically hold that the control of a local public hospital must be wholly vested in the public officials:

> 'We are of the opinion that these statutes (K.R.S. 67.080, 216.010, 216.040, 216.070) authorize a city and a county to join in the operation and maintenance

> of a hospital, but the court finds no authority in them or in any other statute for either the city or the county to take a private corporation or individual into partnership in conducting such public enterprise. To do so is to surrender official responsibility and to delegate the public function to persons who are not responsible to the people. The officers of a municipal corporation cannot so delegate the governmental discretionary authority confided to it by the legislature.
> (118 S.W. (2d) 686)

I am bound by the Booth cases so long as they are not overruled. It is suggested that the Effron case in effect so broadened the approach to public health that for all practical purposes the Booth cases were indeed overruled. I am not so convinced. The Effron case involved the appropriation by the legislature from general funds of the state for distribution to operating hospital societies. There was no effort to transfer a publicly owned institution used for a governmental purpose and the concurrent delegation of complete control to the transferee. Estill County has the same power to make appropriations for the benefit of privately operated hospitals open to the public within the county, K.R.S. 67.080 (8), but where the county establishes and erects a hospital it is required to be under the control of the proper public authorities, K.R.S. 216.040. This requirement has its practical application in that the operation of a local governmental hospital is as difficult politically as it is technically. Dissatisfactions, genuine or fancied, are far too common. In this case there is an expressed complaint because of the religious overtones of the managing body; in another case the complaint might well be on the aspects of the rates and the character of the service. The representatives of the people cannot put it out of their power to answer for the malfunctions of the institution and to correct them where possible.

Defendants also argue in support of their position that a municipal government can lease anything it can sell, and by charter, both the city and the county are empowered to sell their property, K.R.S. 86.110, 67.080; Burns vs. Moore, 307 Ky. 167, 209 S.W. (2d) 735; Commonwealth vs. Corbin, Ky., 264 S.W. (2d) 263. In these cases as well as in others cited by the defendants the property successfully sold, or leased, was either held in a proprietary capacity or no longer used for a governmental function. This Estill County Hospital has been erected and furnished by public funds, always intended for an immediate governmental purpose. The Court of Appeals has observed in the Corbin case:

> 'Whether the statutory authorization (K.R.S. 86.-110) was intended to include the sale and conveyance by the city of property used for governmental purpose has not been adjudicated in Kentucky by any case called to our attention.'

It is my opinion that public property in use or intended for immediate use for a governmental purpose cannot be alienated.

From the foregoing my holding is that so much of the lease agreement here in question as divests the county and city officials of control of the operation of this hospital is invalid.

Where, as in this case, the operation of a hospital by a charitable religious organization is for the benefit of the public and will not extend the power of the particular religion nor represent a pecuniary benefit to that religion, there is no violation of sections 5 and 179 of the constitution. The Effron case, supra; Rawlings vs. Butler, Ky., 290 S.W. (2d) 735.

Plaintiffs also demand that the local governments be required to immediately assume the operation of the hospital

under the provisions of K.R.S. Chapter 216. In the State Bank, etc. vs. Madison County Case, supra, the Court of Appeals held that the management of a local hospital by a private charitable organization, where the county kept control of the rates and services, was a substantial compliance with the legal requirements governing local municipal action, whether they be under chapter 216 or under the general powers of a municipality within its charter. I do not say that the municipalities are not authorized to operate through a private organization. I hold only that so much of the present operating agreement as divests the public officials of managerial control is void.

To answer the defendant's claim that an adverse ruling in this case will cast a shadow on other similar operations in the state and will result in the ultimate loss of hospital service in Estill County, let it be said that I regret it, if it be so. Specifically, however, these similar operations in other counties are not before me, and generally, there is a great ingenuity in human beings to adopt their social institutions to any given situation.

It is my ruling that so much of the operating agreement between the City of Irvine and Estill County and the St. Walburg Monastery of Benedictine Sisters as divests the public officials of those municipalities of control of the management of this hospital is ultra vires and void, and further that the part of the plaintiffs' prayer for relief as demands an order of this court directing the fiscal court and the city council to take over the operation of said hospital and to operate in the method and manner required by Chapter 216 K.R.S. is dismissed.

Counsel to prepare judgment in conformity herewith.

APPENDIX B

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution, Fourteenth Amendment

Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Constitution, Section 3

"Equality; exclusive privileges; amendment of charters. —All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."

Kentucky Constitution, Section 5

"Freedom of conscience; church and state; education.—No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience."

Kentucky Constitution, Section 14

"Courts to be open and speedy trial guaranteed. — All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Kentucky Constitution, Section 171

"Levy and collection of taxes by general laws; public purposes only; uniform within the class and territory; classification of property; bonds of state and its divisions exempt; referendum of laws classifying property; provisions for. — The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all proper-

ty of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

Kentucky Constitution, Section 177

"Commonwealth not to lend its credit or become stockholder in corporation. — The credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association, municipality, or political subdivision of the state; nor shall the Commonwealth become an owner or stockholder in, nor make donation to, any company, association or corporation; nor shall the Commonwealth construct a railroad or other highway."

Kentucky Constitution, Section 178

"Laws authorizing borrowing of money to specify purpose. — All laws authorizing the borrowing of money by and on behalf of the Commonwealth, county or other political subdivision of the state, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for no other purpose."

Kentucky Constitution, Section 179

"County or municipality not to become stockholder in corporation or lend its credit; exceptions. — The general assembly shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads; Provided, If any municipal corporation shall offer to the Commonwealth any property or money for locating or building a capital, and the Commonwealth accepts such offer, the corporation may comply with the offer."

APPENDIX C

STATUTES INVOLVED IN THIS CASE

Title 42, U.S.C., Section 291 h (a) (4).

"Approval of projects and payments for construction.— (a) For each project for construction pursuant to a State plan approved under this part (§§ 291d to 291h of this title), there shall be submitted to the Surgeon General through the State agency an application by the State or a political subdivision thereof or by a public or other nonprofit agency. If two or more agencies join in the construction of the project, the application may be filed by one or more of such agencies. Such application shall set forth: . . . (4) reasonable assurance that adequate financial support will be available for the construction of the project and for its maintenance and operation when completed; . . . . "

Title 42, U.S.C., Section 291m.

"State control of operations. — Except as otherwise specifically provided, nothing in this title (§291 et seq. of this title) shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital, diagnostic or treatment center, rehabilitation facility, or nursing home with respect to which any funds have been or may be expended under this title (§ 291 et seq. of this title)."

Kentucky Revised Statutes, Section 216.040

"Control of hospital; fees; nursing instruction. The county hospital shall be under the control of the proper

county authorities. The fees to be charged patients for attention given and such other fees or charges as may be demanded shall be fixed, regulated and controlled by the governing authority of the hospital, and shall be applied to the maintenance fund of the hosp .. The hospital may provide for instruction and train g of nurses, and issue diplomas to pupils who have completed courses prescribed by rules and regulations adopted in connection therewith."

Kentucky Revised Statutes, Section 216.240

"Hospital commission to operate hospital.

(1) Any city of the second, third, fourth or fifth class purchasing, establishing, erecting or acquiring a municipal hospital under the provisions of KRS 216.080 to 216.230 shall by ordinance provide for the appointment of a commission of seven members to operate, manage and control the municipal hospital, which commission shall be known as the 'Municipal Hospital Commission.' The commission shall provide rules, regulations and by-laws for the management of the municipal hospital and shall, out of the revenue of the hospital, pay necessary operating expenses, repairs and additions thereto, and provide a sufficient reserve fund to insure that the hospital is kept in repair and in safe and sanitary condition and to provide against any emergency that may arise. The commission shall from time to time pay to the city the surplus revenue derived from the operation of the hospital as provided in KRS 216.160. . . ."

APPENDIX D

REGULATIONS INVOLVED IN THIS CASE

PHS Regulation 53.127 (d) (1) (ii).

"Processing construction applications.

. . . (d) **Certification to the Surgeon General.** After the State agency has approved a construction application, it shall recommend it to the Surgeon General for approval and shall certify:

(1) That the application contains reasonable assurance as to title, payment of prevailing rates of wages, and financial support for the non-Federal share of the cost of construction and the entire cost of maintenance and operation when completed; . . .

(ii) To assure the availability of funds for maintenance and operation, the application for the construction of a new project must include a proposed operating budget, on a form prescribed by the Surgeon General, for the two year period immediately following its completion. In the case of an addition to an existing facility, the application must include a statement showing that funds are or will be available to meet the difference between proposed expenditures and anticipated income from the operation of the constructed addition for the two year period immediately following its completion."

PHS Regulation 53.128

"Requests for construction payments — (a) Certification by State agency. The State agency shall certify to the Surgeon General the amount of payments due to an applicant for the cost of work performed and materials and equipment furnished.

(1) Requests for payment under the construction contract shall be submitted in each of three stages, as follows:

. . .

(iii) The third installment when work under the construction contract is completed and final inspection made. . .

(b) **Inspection by State agency**. As a basis for certification by the State agency that payment of an installment is due an applicant, the State agency, without expense to the Federal Government, shall make adequate inspections to determine that the work has been performed upon a project, or purchases have been made, in accordance with the approved plans and specifications."

APPENDIX E

THOSE PORTIONS OF THE RECORD IN WHICH FEDERAL QUESTIONS ARE RAISED AND DECIDED

Complaint

6. Plaintiffs further state that in direct violation of said mandatory provisions requiring said county officials and said city officials to operate said hospital in the method and manner provided by law by Chapter 216 KRS, the said Fiscal Court of Estill County and the said city council of the City of Irvine without authority of law and and in direct violation of law have entered into an AGREEMENT OF LEASE with the defendant, St. Walburg Monastery of Benedictine Sisters of Covington, Kentucky, Inc., an agent and instrumentality of the Roman Catholic Church, which lease is for a term of ninety nine years at the nominal rental price of One ($1.00) Dollar per year with right of renewal forever. Plaintiffs state that the making of said AGREEMENT OF LEASE by said city and county officials constitutes an effort and purpose on their part to make a gift of said public property to the said Catholic agency, an integral part of the Catholic Church, all of which is in violation of the Third and Fifth Sections of the Kentucky Constitution and the First and Fourteenth Amendment to the Constitution of the United States and said Chapter 216 KRS. The giving of said property to said Catholic Church and its agency in perpetuity constitutes a granting of exclusive separate public emoluments and privileges to said Catholic agency without consideration of public service and constitutes giving preference to a religious sect in violation of the basic and fundamental constitutional provisions, state and federal, for the separation of church and state. . .

9. Plaintiffs state that by reason of the foregoing facts and matters alleged the AGREEMENT OF LEASE by which said public property is in legal effect donated and given to the said Catholic Order, an integral part and agency of the Catholic Church, same constitutes the donation of state taxes and federal taxes (under the Hill-Burton Law) to support the religious activities of the Catholic Church and one of its institutions and the teaching and practicing of the Catholic religion, and same constitutes a violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States and of the aforesaid provisions of the Kentucky Constitution. . . ."

Trial Court's Judgment

"For the reasons stated in the Opinion rendered herein on September 23, 1959, it is ordered and adjudged that:

1. So much of the agreement between the City of Irvine and Estill County and the St. Walburg Monastery of Benedictine Sisters as divests the public officials of these municipalities of control of the management of this propty and the hospital operation located thereon is ultra vires and void.

2. Plaintiffs' prayer for relief demanding that the fiscal court and the city council take over the operation of the said hospital is dismissed . . . ."

Motion and Grounds for New Trial

" . . . Plaintiffs further move that said judgment be set aside and a new trial be granted herein for reason that the judgment is violative of the Fourteenth Amendment to the Constitution of the United States in that the court as an officer and agent of the State of Kentucky and the State

of Kentucky by and through said court has deprived the plaintiffs, citizens and taxpayers of Estill County and the City of Irvine, of said public hospital without due process of law and has denied to plaintiffs, the citizens and taxpayers of said city and county, of the equal protection of the laws, and in the following respects:

A. The defendants constituting the public officials of the said city and county are by said judgment permitted to continue to violate the mandatory provisions of Chapter 216 KRS, and as a direct result thereof the defendant, Catholic Order, is afforded the special privilege of retaining title to and using public property for their religious and sectarian purposes.

B. The judgment permits the taking of plaintiffs' public property by said Catholic Order without due process of law by reason of the fact that the lease in question in effect gives title in perpetuity to said Catholic Order in violation of Kentucky law and no remedy is given or enforced by said judgment; and said judgment in legal effect affords no relief whatever to plaintiffs and it is therefore in clear conflict with the fundamental principles which have been established in our system of jurisprudence for the enforcement and protection of property as well as private rights.

C. Said judgment is further violative of said Fourteenth Amendment to the Constitution of the United States in that it violates the basic principle that all persons similarly situated shall be treated equal and makes possible and perpetuates the preferred treatment given to the Catholic Order now in control and possession of said public property under said illegal and void lease, and said judgment affords no remedy or relief by reason of the violation of the rights and taking of the property of plaintiffs . . . "

Order Overruling Motion and Grounds for New Trial

"Plaintiffs' motion for new trial is ordered overruled."

Appellate Court's Opinion

". . . The final contention of the appellants is that the lease gives public property to a religious organization in violation of Sections 1, 3 and 5 of the Kentucky Constitution and the First and Fourteenth Amendments to the Constitution of the United States. This contention is fully answered and refuted by the opinion in Kentucky Building Commission v. Effron, 310 Ky. 355, 220 S.W. 2d 836 . . ."

Petition for Rehearing

"May we respectfully point out to the court that the opinion delivered in this case is in direct conflict with the Constitution and laws of the United States. When properly analyzed the opinion refutes itself. The court is therefore respectfully requested and urged to withdraw the opinion and write an opinion giving effect to Chapter 216 of KRS and the Constitution and laws of the United States and of Kentucky . . . .

In view of the court's decision that the hospital in question is to be operated by a private organization in direct violation of KRS 216.040 and in direct conflict with the opinions which are cited by the court, it is unmistakably clear that the court is in error in upholding the lease in question. The principles of law discussed in our original brief are undoubtedly controlling in this case and, if the opinion is allowed to stand as written, both the Constitution of Kentucky and the Constitution of the United States and the mandatory statutory provisions of KRS 216 are clearly violated. . . ."

Order Overruling Petition for Rehearing

"The Court being sufficiently advised, the opinion delivered herein is modifed on its face, and it is considered that the appellants' and cross-appellees' petition for rehearing be and the same is hereby overruled."

APPENDIX F

THE JUDGMENTS SOUGHT TO BE REVIEWED

ORDERS — KENTUCKY COURT OF APPEALS

Spring Term, May 5, 1961

Rev. G. R. Abernathy, et al., - - - - - - Appellants
vs. Appeal from a judgment of the Estill Circuit Court
City of Irvine, et al., - - - - - - - - Appellees

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants, their cost herein expended.

AND

City of Irvine, et al., - - - - - - - Cross-appellants
vs: Appeal from a judgment of the Estill Circuit Court
Rev. G. R. Abernathy, et al., - - - - - Cross-appellees

The Court being sufficiently advised, it seems to them the judgment herein is erroneous,

It is therefore considered that said judgment on the cross-appeal be reversed to the extent that it declares the lease invalid on the ground of divestiture of public control, with directions to enter judgment declaring the lease to be valid; which is ordered to be certified to said court.

It is further considered that the cross-appellants recover of the cross-appellees, their cost herein expended.

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 304

G. R. ABERNATHY, ET AL., Petitioners,

versus

CITY OF IRVINE, ET AL., Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

BEN H. SCOTT,
Irvine, Kentucky,
MART V. MAINOUS,
Irvine, Kentucky,
THOMAS D. SHUMATE,
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Irvine, Kentucky,
Attorneys for Respondents.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

TABLE OF CASES, TEXTBOOKS AND STATUTES CITED IN TEXT.

The cases herein discussed are the same as those discussed by the petitioners and discussed in the opinion of the Court of Appeals of the Commonwealth of Kentucky.

IN THE

Supreme Court of the United States

October Term, 1962

No. _____

G. R. ABERNATHY, ET AL., - - *Petitioners,*

v.

CITY OF IRVINE, ET AL., - - - *Respondents.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

To the Honorable: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents request that the petition for a writ of certiorari to the Court of Appeals of Kentucky be denied. We respectfully submit that the petition should be denied for reasons as follows:

The lease contract provides that the lessee is to continuously operate the hospital; at reasonable rates; to keep it repaired; to maintain insurance against loss or injury by fire and storm and in default of any of said provisions the city of Irvine and Estill County have the right to terminate the lease. The contract is not copied in full in the petition herein, and we request the Court to carefully read same. It appears to be the view of the petitioners that public funds are committed to the operation of this hospital. There is no basis for this conclusion, because public funds are not com-

mitted to the operation of this hospital, and there is no such provision in the lease contract.

Apparently it is the view of the petitioners that a municipality has no power to dispose of its property. As pointed out in the opinion of the Court of Appeals of the Commonwealth of Kentucky a municipality does have such power, and it necessarily follows that if a municipality can dispose of its property it certainly can lease its property.

The record establishes that Estill County and the city of Irvine are unable to operate this hospital, the total population of Estill County inclusive of the city of Irvine as determined by the 1960 Census being 12,466. The people of this county are very happy over the operation of the hospital except an intolerant handful of ministers and laymen.

The administrators of the Hill-Burton Act approved of the lease in issue.

CONCLUSION.

For the reasons aforesaid, the respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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